IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A. Bates Butler, as Trustee of
Construction Materials Co.,

Appellant,

vs.

City of Tucson, et al.,

Appellees.

The Bank of Tucson,

Appellant,

vs. No. 20390

Pacific National Insurance Company, City of Tucson, Martin Construction Company and A. Bates Butler,

Appellees.

Martin Construction Co. and
Pacific National Insurance Co.,

Appellants,

vs.

Bank of Tucson, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA

ANSWERING BRIEF OF APPELLEE AND OPENING BRIEF OF CROSS-APPELLANT THE BANK OF TUCSON

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JURISDICTIONAL STATEMENT

This cross-appeal is brought from a judgment entered on the 26th day of May, 1965, by the United States District Court for the District of Arizona and is brought under the jurisdiction established by Rule 73, Federal Rules of Civil Procedure and 28 USC §1291.

INTRODUCTION

For clarity, THE BANK OF TUCSON, Appellee and Cross-Appellant, will hereinafter be referred to as Bank; MARTIN CONSTRUCTION COMPANY, Appellee and Cross-Appellant will hereinafter be referred to as Martin; PACIFIC NATIONAL INSURANCE CO., Appellee and Cross-Appellant will hereinafter be referred to as Pacific; and A. BATES BUTLER, Appellant and Cross-Appellee will hereinafter be referred to

as Trustee, who is the Trustee of Construction Materials Company, a corporation, now in bankruptcy, hereinafter referred to as Construction.

STATEMENT OF THE CASE

APPEAL OF TRUSTEE: The appeal perfected by the Trustee has apparently been abandoned as to this Appellee, The Bank of Tucson or its interests. Therefore, this brief will only briefly concern itself with the plaintiff's appeal.

CROSS-APPEAL OF THE BANK OF TUCSON: This case is only concerned as far as the cross-appeal of this Cross-Appellant is concerned, as to whether or not the Bank was entitled to receive as its attorneys' fees the ten (10%) per cent amount specified in a promissory note, in addition to the sums of principal and interest due thereunder which were awarded to

it, and whether the last sentence of Findings of Fact No. 25 herein, is contrary to the evidence when the reasonableness of the fees was not put in issue nor any evidence introduced thereon.

It is the contention of the Bank that in addition to the amount of the principal and interest due upon said promissory note, it was entitled to receive the amount specified therein as and for its attorneys' fees.

By stipulation and order the Appellees and Cross-Appellants have combined their answering briefs on appeal and their opening appeal briefs on the cross-appeals.

FACTS OF THE CASE

Construction entered into two (2) improvement construction contracts with

the City. The first was called the El Campo Estates Additional Paving Improvement Construction Contract. The second was known as the Wilmot Road, Broadway to Speedway, Paving and Drainage Structure District Contract, hereinafter referred to as the Wilmot Road Contract, the proceeds of which were thereafter assigned by Construction to the Bank by Joint Exhibit 20 to secure payment of Construction's promissory note to the Bank. (Joint Exhibit 19) Thereafter, the Bank advanced various sums of money thereunder to Construction, and the Bank thereafter received cash collections to be applied against said note which reduced the principal balance due to the sum of $25,126.69 together with interest thereon at the rate of six (6%) per cent per annum from December 12, 1963, which balance remained

due and owing until the entry of judgment herein. The promissory note which was placed in the hands of the Bank's attorneys for collection, Joint Exhibit 19, provides for attorneys' fees to be awarded to the Bank in the sum of ten (10%) per cent of the amount found to be due and owing thereon. Pursuant to Arizona Revised Statutes, Title 9, Chapter 6 and the terms of the Wilmot Road, Broadway to Speedway, Paving and Drainage Structure District Contract as the proceeds thereof the City issued non-negotiable improvement district bonds in the principal sum of $57,383.69, which all parties claimed and which were placed in the registry of the District Court pending the determination of the District Court in the proceedings out of which the instant appeals arose.

Of the non-negotiable bonds, the

Bank was awarded a sufficient amount to make the principal and interest then due on the promissory note of Construction (Joint Exhibit 19) pursuant to the assignment of the Wilmot Road, Broadway to Speedway, Paving and Drainage District Contract proceeds (Joint Exhibit 20), but was not awarded any portion of said bonds to make the amount of its attorneys' fees provided for in said promissory note nor was it awarded any sums as and for its attorneys' fees, contrary to the terms of said promissory note.

SPECIFICATION OF ERROR RELIED ON

The District Court erred in so much of Finding of Fact No. 25 as found that ten (10%) per cent of the amount found due from Construction to the Bank would be an unreasonable sum to be allowed to said defendant as attorneys'

fees in this case, and further erred in so much of Conclusions of Law No. 11 as fails to allow The Bank of Tucson, in addition to the sums of principal and interest due, then (10%) per cent of such amount as and for its attorneys' fees, and erred in not awarding the Bank any amount for attorneys' fees.

QUESTION PRESENTED

In the absence of a tender of issue thereon and an affirmative showing of unreasonableness, does the Court have the power to deny a stipulated amount or percentage for attorneys' fees in awarding a judgment on a negotiable instrument?

ARGUMENT

The Bank's position is that in the absence of a tender of issue of unreasonableness and proof thereof, a

stipulation for a stated per cent as attorneys' fees in a negotiable instrument is binding and must be honored.

This position is amply supported by 17 Am.Jur.2d, Contracts, §2294 which says:

> "A stipulation for attorneys fees is binding...."

and also by Bank of Commerce v. Fuqua, 11 Mont. 285, 28 P. 291; Franklin v. Duncan, 133 Tenn. 472, 182 S.W. 230 (noting validity and enforceability of stipulation for ten (10%) per cent attorneys' fees in a promissory note); and Downey v. Coolidge, 48 Wash.2d 45, 294 P.2d 926, 117 A.L.R. 1236.

17 Am.Jur.2d, Contracts, §352, further states as the rule:

> ".... a stipulation that a certain amount shall be collectible as attorneys fees controls recovery if the amount stipulated is reasonable .... ."

And,

> "If the maker or debtor has stipulated to pay a specified sum as attorneys fees and no issue is raised by him as to its reasonableness, the judgment in an action upon the instrument may properly include the amount so stipulated according to a number of cases. Thus, in such cases it is held that the burden is upon the debtor, and that in the absence of allegation or proof by him that the stipulated amount is unreasonable or that the creditor has incurred no expenses in the premises, the percentage provision will be enforced .... ."

This rule is supported by the cases of Taylor v. Continental Supply Co., CA 8 Colo. and 16 F.2d 578; Kuper v. Schmidt, 161 Tex. 189, 338 S.W.2d 948, which hold that, as stated in Taylor v. Continental Supply Co. (supra):

> "The amount in a note agreed on as attorneys fees is presumed to be a reasonable attorney's fees, and the burden is on defendant, when suit is brought on a note providing attorneys fees, to show that the amount fixed in the note is not such."

Squarely in point is Tsesmelis v. Sinton

State Bank, 53 S.W.2d 461, 85 A.L.R. 319, which holds that where the maker of a note agreed to pay attorneys' fees of ten (10%) per cent if placed in the hands of an attorney for collection, and no issue is made of the reasonableness of such fee, judgment in an action on note may properly include the amount so stipulated.

To the same effect are: Conway v. American National Bank, 146 Va. 357, 131 S.E. 803, and First National Bank v. Robinson, 135 S.W. 372.

As pointed out by Cross-Appellee, Trustee, in his opening brief, the law of the State of Arizona governs here, Erie Railroad v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188; Adelman v. Centaur Corp., (CCA Ohio) 145 F.2d 573.

Turning then to the Arizona cases, we find that Arizona has adopted the

rule above set forth and supported.

The Supreme Court of Arizona in several cases, chiefly Pioneer Construction v. Symes', 77 Ariz. 107, 267 P.2d 740 and Mayo v. Ephrom, 84 Ariz. 169, 325 P.2d 814, has by necessary implication or assumption, adopted the rule that where a stipulated per cent of a note is provided as attorneys' fees, such amount will be awarded in the absence of an issue as to and a showing of the unreasonableness thereof. This it has done by holding that where suit is brought on such a note and there is a counterclaim on which judgment is also given, the amount thereof must be deducted from the amount found due on the promissory note before applying the stipulated per cent to determine the attorneys' fees to be awarded.

In further support of this

position, it is to be observed that the State of Arizona has adopted the Uniform Negotiable Instruments Act (Arizona Revised Statutes, 44-401, et seq). The adoption of this act is given great weight as an approval of the State Legislature of the percentage provision for attorneys' fees. 17 A.L.R.2d 297, §7.

In this case no issue was even raised as to the reasonableness of the attorneys' fees specified in the promissory note in evidence as Joint Exhibit 20 which provides for ten (10%) per cent of the amount found to be due on date of judgment as attorneys' fees. Further, there was absolutely no evidence of unreasonableness introduced. This, taken into account together with the Findings of Fact that there was due thereunder the sum of $25,169.26, together with interest at six (6%) per

cent per annum thereon to the date of judgment May 26, 1965, from November 11, 1963, establishes the exact amount of attorneys' fees to which the Bank is entitled, in addition to the sums of principal and interest awarded it.

Further as noted in 9 Am.Jur.2d, Bankruptcy, §962:

> "A secured obligation for the payment of attorneys' fees and necessary expenses of collection is one which survives bankruptcy."

Security and Mortgage Co. v. Powers, 278 U.S. 149, 73 L.Ed. 236, 49 S.Ct. 84, so there is no question as to the Bank's right to recover the stipulated attorneys' fees out of the proceeds of the Wilmot Road, Broadway to Speedway, Paving and Drainage Structure District Contract, the non-negotiable municipal bonds, as against a trustee in bankruptcy.

As Judge Sanborn said in Cleo Syrup Corp. v. Coca Cola Co., (CA 8) 139 F.2d 416, cert. den., 321 U.S. 78, Findings of Fact of the District Court will only be set aside where there is no substantial evidence to support it, or where induced by an erroneous view of the law (citing cases). This is the law and needs no further elaboration. In this case there is not only no substantial evidence to support that part of Finding of Fact No. 25 which finds that ten (10%) per cent of the amount found to be due on the note ($25,126.69 plus interest at six (6%) per cent per annum from December 11, 1963 to May 26, 1965) would be an unreasonable attorney's fee, but there was no evidence whatever to support it. As previously noted it must have been induced by an erroneous view of the law.

For the foregoing reasons, the

judgment entered herein should be reversed as to the finding of unreasonableness as attorneys' fees to the Bank of ten (10%) per cent of the amount found to be due on the promissory note, with instructions to enter judgment in favor of the Bank for that sum in addition to the sums previously awarded as principal and interest.

Turning then briefly to the Trustee's appeal, it appears that the Trustee has abandoned his appeal as it relates to the Bank of Tucson and conceded thereby the Bank's position.

In the introduction to his brief, Appellant, Trustee, states that after thorough research he has abandoned the points he had intended to rely on under Counts One and Two of his complaint and will solely present argument as to the questions presented under Count Three.

He then, on Page 2 of Appellant's brief, under the heading Statement of the Case, says:

> "This case is concerned with whether or not the Trustee has title to certain bonds under Section 70(a) of the Bankruptcy Act, or whether Martin has an equitable lien upon such bonds pursuant to Conclusion of Law Numbers 12 and 13."

The named Conclusions deal with an equitable lien of Martin on the bonds and do not concern the Bank, which was, under Conclusion No. 11 (not assigned as error) awarded sufficient of the bonds to make the principal and interest due it as a prior claim to that of the lien of Martin set forth in Conclusions No. 12 and 13. The abandonment of the appeal as to the Bank is further clarified by the Trustee on Page 4 of his opening brief under the headings Specification of Error Relied

Upon and Question Presented, in which he states that the question presented is:

> "Is an Agreement to assign certain contractual rights sufficient to create an equitable lien on such contractual rights."

This, of course, does not in any way affect the interest of the Bank nor the judgment entered in its favor as it deals solely, as do the specifications of error relied upon, with the rights of Martin and the Trustee as to the bonds remaining after the Bank of Tucson has taken sufficient thereof to make its principal and interest due. Further, the Trustee's argument presented on Pages 4 through 8 of his brief deals solely with the question of whether or not Martin has an equitable lien by reason of its agreement to assign the balance of the bonds after the Bank has

taken its share or whether the balance thereof belongs to the Trustee.

It may also be noted that the same rules are applicable to the Bank and the Trustee in Count Three as in Counts One and Two. If the assignments were good, as against the Trustee with respect to the matters set forth in Counts One and Two, as Trustee now concedes, then it is also good as against him as to his claims under Count Three as the assignment is the same one concerned with in Count Two and the subject matter - i.e., the Wilmot Road Contract proceeds are also the same. In fact, as above noted it appears that Trustee also concedes this and is limiting this appeal to the question of the respective rights of Trustee and Martin to the balance or residue of the improvement district bonds

after the Bank's claim is satisfied.

For the foregoing reasons, this Appellee will present only the following very limited brief with regard to its right to sufficient of the subject bonds to make the amount of principal and interest found due it in the event any question is raised by the Appellant Trustee in his Reply Brief in relation thereto.

As is noted in the Statement of the Case, Construction entered into the Wilmot Road Contract and promptly assigned the proceeds by Joint Exhibit 20 to the Bank to secure Construction's promissory note to the Bank (Joint Exhibit 19) (Stipulated Facts, pp. 4 and 5). Thereafter, the Bank received collections under the assignment sufficient to reduce the principal balance to

$25,126.69 plus interest and attorneys' fees as provided in the note, at which time improvement District bonds were issued by the City of Tucson.

If the Appellant Trustee desires to raise the question as to the respective rights of Trustee and the Bank as against these bonds, it is to be first noted that the bonds are non-negotiable as each provides, as required by Arizona Revised Statutes 9-695, that it:

> ".... is payable only out of the special funds to be collected from special assessments imposed on the lots or parcel of land fronted on or benefited from said improvement." (Finding of Fact No. 21)

Therefore, by the terms of Arizona Revised Statutes, 44-401 and 403, these bonds are non-negotiable. Section 401 provides as follows:

> "An instrument to be negotiable must conform to the following requirements ....

> "Must contain an unconditional promise or order to pay a sum certain .... ."

And Section 403 provides, in Subsection B thereof:

> "But an order or promise to pay only out of a particular fund is not negotiable."

Therefore, the bonds are obviously not negotiable, being payable only out of a particular fund. Moore v. Nampa, 276 U.S. 536; Northern Trust Co. v. Wilmette, 77 N.E. 169; Manker v. American Savings Bank and Trust Co., 230 P. 406, 42 A.L.R. 1021; Washington County v. William, (CA 8) Neb., 111 F. 801.

Also an examination of the assignment, Joint Exhibit 20, reveals that it is an assignment of the right to receive the proceeds of the Wilmot Construction Contract and there is no doubt that the right to receive such proceeds is chose in action which can be validly presently

assigned. Kuhnen v. National Bank of Liberty, 187 N.Y.2d 598; Costello v. Bank of America National Trust and Savings Association, (CA 9) 246 F.2d 807 and Restatement of Law of Contracts, §149 and §154.

Therefore, the bonds in question, being the proceeds of the Wilmot Construction Contract, having been assigned many months prior to bankruptcy and the assignment having been served upon the City of Tucson and accepted by it (Stipulation of Facts, p. 5), the assignment was valid as against the Trustee in Bankruptcy and the other parties even though service of the assignment on the individual property owners was not made until later as such service is not necessary. Smith v. Harris, 278 P.2d 835, 6 Am.Jur.2d, Assignments, §97; Cincinnati Iron Store

Co., (CA 6 Ohio) 167 F. 46; Robertson v. Hennochsberg, 1 F.2d 604; Walton v. Horkan, 814 S.E. 105; Jennings v. Whitney, 112 N.E. 665; Pillsbury Investment Co. v. Otto, 65 N.W.2d 914; Joyce-Pruitt Co. v. Meadows, 244 P. 889; Moore v. Schenck, 3 Hill (N.Y.) 228; Campbell v. J. E. Grant Co., 82 S.W. 794; Goodwin v. Barre Savings Bank and Trust Co., 100 Alt. 34; Stansberry v. Meadow Land Dairy, 105 P.2d 86; Greery v. Dockendorf, 231 U.S. 513.

Further the chose in action involved here was assignable, for, as noted in the cases of Commercial Life Insurance Company v. Wright and Employers Casualty Co. v. Moore, 166 P.2d 943 and 143 P.2d 414, respectively, by the Supreme Court of Arizona, quoting Volume I, Restatement of Law of Contracts, Sec. 154:

> "Except as stated in Sec. 151, a right expected to arise in the future under a contract of employment in existence at the time of the assignment may be effectively assigned."

The exceptions set forth in Sec. 151 thereof, of course, are not applicable to this action and the Stipulation of Facts, pages 4 and 5, shows that the Wilmot Contract, the proceeds of which were assigned, was in fact in existence at the time of the assignment.

The Supreme Court of Arizona in Employment Casualty Co. v. Moore (supra) further said:

> "The test as to assignability of a chose is whether it will survive and pass to the personal representative. If it will survive, it can be assigned."

Arizona Revised Statutes 14-477 provides that in Arizona all causes survive with exception of those specifically set forth therein, such as

breach of promise to marry, seduction, liable, slander, separate maintenance, alimony, loss of consortium, or invasion of the right of privacy, none of which are applicable to this action. Therefore, the choses here involved were assignable and, in fact, assigned.

CONCLUSION

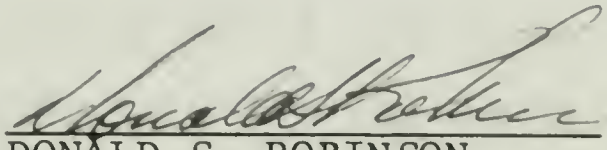
As first noted, the Trustee apparently has abandoned his appeal as to all points affecting the judgment entered in favor of this Appellee, The Bank of Tucson, and acknowledges that the Bank's position is correct. In addition, the above-cited authorities establish that the contract proceeds of the Wilmot Contract, to-wit, the non-negotiable bonds, were, in fact, assigned prior to bankruptcy and that such assignment was valid as against

the trustee and the other parties. Therefore, the Bank was entitled to receive the balance of the principal and interest due pursuant to the promissory note as against all other parties.

In addition to the principal and interest, the Bank was also entitled to have the stipulated percentage of the amounts found to be due under the promissory note as and for its attorneys fees as the other parties to the action failed to place the unreasonableness of the amount thereof, in issue, or to introduce any evidence whatsoever on the matter.

It is therefore respectfully submitted that the judgment of the District Court should be upheld in its entirety, with the exception that it should be reversed as to the question of the allowance of the Bank of Tucson's attorneys'

fees as specified in the promissory note of Construction, and the Bank be given judgment for its attorneys' fees as a prior claim to all of the parties in and to the balance of the remainder of the bonds.



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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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